

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIMPSON STRONG-TIE)
COMPANY, INC.,)
)
Plaintiff,)
)
v.) No. 5:20-cv-06957-VKD
)
MITEK, INC.,)
)
Defendant.)
)
_____)

CONFIDENTIAL

VIDEOTAPED DEPOSITION OF DAVID JOEL FRANKLYN
Phoenix, Arizona
September 1, 2022
9:00 a.m.

REPORTED BY:
Kate E. Roundy, RPR
Arizona Certified Reporter
Certificate No. 50582

1 I am not authorized to administer an oath. I'm
2 not related to any party in this action, nor am I
3 financially interested in the outcome.

4 Counsel and all present in the room and everyone
5 attending remotely will now state their appearances and
6 affiliations for the record, beginning with the noticing
7 attorney.

8 MR. PONIATOWSKI: Good morning.
9 Daniel Poniatowski, Shartsis Fries, on behalf of
10 plaintiff, Simpson-Strong Tie, Inc.

11 MS. ARAUJO: And Judith Araujo, Stinson, LLP, on
12 behalf of defendant, MiTek Inc., and the witness,
13 David Franklyn.

14 THE VIDEOGRAPHER: And will the court reporter
15 please swear in the witness.

16
17 DAVID JOEL FRANKLYN,
18 called as a witness herein, having been first duly sworn
19 by the Certified Court Reporter, was examined and
20 testified as follows:

21

22 EXAMINATION

23 BY MR. PONIATOWSKI:

24 Q. Good morning, Professor Franklyn.

25 A. Good morning.

1 between people about various aspect -- about who puts out
2 this product, about who puts out MiTek products, about who
3 endorses it, about who sponsors it.

4 Those are trademark law principles and unfair
5 competition law principles.

6 And for him to legitimately support those
7 opinions, he needed to do, in my opinion, the proper
8 trademark surveys, and he needed to do separate proper
9 false advertising surveys to support his opinions about
10 the false adver- -- about the false advertising claims
11 that have been raised in this case.

12 Q. Okay. Let me ask you this.

13 You referred to the Wallace report, Exhibit 300,
14 big stack in front of you, but page 47 of that report, and
15 specifically paragraph 116.

16 A. Uh-huh.

17 Q. I just want to refer you to the first two
18 sentences.

19 And it says: To my knowledge, there is no court
20 accepted percentage of net deception caused by
21 false/deceptive advertising that warrants a finding of
22 false and deceptive brand communications.

23 It is most certainty in the discretion of the
24 Court to determine the specific level of deception it
25 accepts as an indication that this deception exists

1 throughout the relevant consuming public.

2 Do you agree with those two sentences as written?

3 A. I do. And I don't think they contradict what I
4 told you a minute ago, that -- to repeat, that in this
5 context of false advertising, the courts have not woven
6 together numerical benchmarks as they've done in -- in
7 trademark cases.

8 Q. And in secondary meaning cases?

9 A. And in second- -- well, yes, in confusion and in
10 secondary meaning, that's right.

11 There are there, you know, numbers, but he
12 can't --

13 Well, I'll let you ask the question.

14 Q. Yeah. Yeah. I appreciate it.

15 A. I -- I'll let you do your -- your thing.

16 Q. Thank you.

17 So you have the book in front of you that we
18 marked as Exhibit 307?

19 A. Yes.

20 Q. Can you please refer to page 102 of that book?

21 And I'll direct you to the last paragraph on the
22 page, and the first sentence, which reads: There is no
23 well-defined threshold for establishing secondary meaning
24 leaving interpretation to the discretion of the finders of
25 fact in each case.

1 Do you agree with that sentence?

2 A. Not entirely.

3 Q. Okay. In what way do you disagree with that?

4 A. Well, I -- I teach this and I study this and I
5 think there is no absolute threshold that has been
6 uniformly numericalized for establishing secondary meaning
7 if a survey has been done.

8 But -- and -- and, therefore, it -- it can be
9 looked at on a case-by-case basis.

10 But, if you look at the rest of it, in that
11 paragraph, she alludes to more or less what I was saying,
12 which is courts have been persuaded by a single source
13 response of at least 50 percent net named and anonymous,
14 numbers in the 30s have been deemed marginal, but have
15 been accepted in some cases.

16 If more than half of the single-source responses
17 are merely anonymous or incorrectly identified, the
18 findings may, in fact, be deemed insufficient for that
19 reason alone, which is an issue in this case.

20 Even if a net 42 percent correct score
21 identified -- identification was not, in and of itself,
22 sufficient to establish secondary meaning for an
23 illustration of the Hershey 4-by-3 chocolate bar panel
24 design because imprint patterns that delineate or
25 facilitate serving portions were deemed to have some

1 functionality, but in the context of other relevant
2 factors the survey was ultimately found to be persuasive.

3 And then you see 33 percent. I have never seen
4 secondary meaning proved through a survey with net numbers
5 lower than the 30s.

6 So I haven't seen it, for example, with like
7 10 percent or 3 percent or 20 percent.

8 And so when my students ask me is there a
9 benchmark, I basically reiterate everything she said here,
10 and, you know -- and that's -- I agree with her, if you
11 read it all in context.

12 But I -- I do not think it could be read out of
13 the context to say, therefore, extremely low numbers are
14 likely to get it.

15 You know. I mean, I won't -- if you take -- if
16 you take -- Excuse me.

17 I was once asked to do a secondary meaning survey
18 for the color black for a mat for the box that was used to
19 sell a Kimberly-Clark brand of feminine napkins, and a
20 competitor had started selling them in a similar color box
21 and -- under a different name, and Kimberly-Clark wanted
22 to know what they could do to prove secondary meaning in
23 their color.

24 And a survey showed that only about 10 percent of
25 women associated with the single source, and it was not

1 considered by anybody to be sufficient evidence of
2 secondary meaning.

3 You know, 5 percent of the public associates a
4 color or a name or in this case a -- a product description
5 with a particular source and half of those people can't
6 name the source, in my opinion, which is all I'm giving
7 here, that's not enough.

8 Because secondary meaning means that a
9 substantial, if not majority part, of the relevant
10 consuming public has come to see a product feature or
11 attribute as part of the brand of the company and not
12 merely as communicative information.

13 And that needs to be in order, then, to award
14 trademark rights, the courts have definitely imposed
15 through the case law development an elevated requirement.

16 So -- so, yes, I agree with her statement in
17 context.

18 Q. Professor Franklyn, I'd like to ask you about
19 another statement in this book on page 329.

20 MS. ARAUJO: I will forgive you for not bringing
21 me my own book, Daniel, but next time.

22 MR. PONIATOWSKI: Yeah. From the law library --

23 THE WITNESS: Did you buy -- did you buy this?

24 MR. PONIATOWSKI: That's from the Hastings law
25 library, if you look at the top.